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Federal employees could get GAO appeal rights under A-76 revisions

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In a policy change that could expand the rights of federal employees who must compete for their jobs with private contractors, new rules could allow a representative of employees to appeal A-76 decisions to the General Accounting Office.

The change-contained in the [revised version of Office of Management and Budget Circular A-76](#)-is seen as an attempt to give employees similar appeal rights as contractors who lose out in public-private job competitions. But the General Accounting Office is still reviewing the new circular, and a federal employee union questioned whether the new rights would represent a gain for civil servants in the public-private job competition process.

A provision in the new A-76 could give the official representative of in-house employees-known as the Agency Tender Official (ATO)-the legal basis to file GAO bid protests on behalf of employees. Specifically, the new circular makes the ATO a "directly interested party," a legal classification that could allow them to file protests.

Observers saw the language as OMB's attempt to give federal employees the right to appeal adverse A-76 decisions to GAO.

"In our interpretation the ATO...has the authority and the responsibility to manage an appeal or ultimately GAO protest if they deem it necessary," said Bert Concklin, director of the competitive sourcing office at the Internal Revenue Service.

"Given the rules as written right now [OMB] took it as far as they could to

give employees some rights," added Steven Sorrett, a lawyer with Reed Smith LLP.

But it's up to the General Accounting Office to decide whether to accept protests from the ATO, and the agency is still reviewing the matter, according to Comptroller General David Walker.

"Now that's not something [OMB] can end up dealing with unilaterally, and I've got our people looking at whether or not (a) that was [OMB's] intent and (b) whether it is the type of legal approach we're allowed to hear," he said in a recent interview with *Government Executive*.

GAO has allowed contractors to protest A-76 decisions since the 1980s, but has never accepted protests from in-house employees or unions that represent federal employees. In a June 2000 decision, GAO ruled that unions lack standing to file protests because they are not "interested parties" under the 1984 Competition in Contracting Act, partly because unions cannot receive a contract to perform work in question.

But in a decision issued this July, GAO noted that Federal Prison Industries could be an interested party, despite the fact that it does not enter into traditional contracts when it performs work for federal agencies. Procurement lawyers took this as a sign that GAO might grant standing to federal employee groups that sign contract-like agreements, according to Sorrett.

"We felt they were trying to signal something," he said. "In [*Federal Prisons*](#) they kind of left a big hint that if you had an agency [that] ended up in a relationship with the government, that they had sort of a contract type of arrangement, they would nevertheless be looking at it as a way to give them standing under the [Competition in Contracting Act]."

In-house teams that win A-76 competitions would be required to sign binding performance agreements under the revised A-76 Circular.

Depending on GAO's decision, the new A-76 Circular could expand employees' protest rights. But an official with a federal employee union charged these rights would mean little to employees involved in OMB's new public-private job competition process, which the union believes is skewed to benefit contractors.

"The so-called "best value" method is an inherently subjective process, so it's not clear what there is to appeal," said Jacques Simon, public policy director for the American Federation of Government Employees.

Agencies would likely limit the authority of the ATO to file protests on

behalf of in-house workers, according to Concklin.

"I think agencies will impose some constraints on that person in that role," said Concklin. "They won't be able to unilaterally decide to appeal if contractors win."

The ATO would be an "inherently governmental" official and would not be part of the in-house team.

Agencies would also have to set aside funds and legal staff so the ATO could afford to take protests to GAO.

OMB is accepting comments on its [proposed revisions](#) to Circular A-76 until Dec. 19. The budget office is urging interested parties to submit comments by email, at A-76comments@omb.eop.gov.

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